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**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDD/147120

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 15, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on May 15, 2013, at Milwaukee, Wisconsin.

NOTE: The record was held open to allow Attorney DeLessio an opportunity to supplement the record with Petitioner's medical records from his most recent hospital stay. Attorney DeLessio submitted a 200 page packet of medical records that has been marked as Exhibit 12 and entered into the record.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly determined that Petitioner is not disabled for the purposes of receiving Medicaid benefits.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

Attorney Patricia DeLessio  
230 West Wells Street, Room 800  
Milwaukee, WI 53203

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703  
By: DDB file

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Milwaukee County.

2. On March 14, 2012, Petitioner submitted applications for Medicaid benefits under both a presumptive disability and regular Medicaid. Petitioner alleged that he was disabled by spinal stenosis. (DDB file)
3. Petitioner was approved for Medicaid benefits under a presumptive disability. (Exhibits 2 and 4)
4. On April 11, 2012, Petitioner applied for Social Security Disability Income (SSDI) Benefits. Petitioner alleged that he was disabled due to “C4-C7 cervical stenosis; neuroforaminal stenosis; L1 vertebrate compression fracture; spondylosis of the cervical spine; cervical lordosis upper cervical spine; osperphypes [sic] present at multiple levels; left and right hand issues; numbness in hands; depression. (DDB file)
5. On September 27, 2012, the Social Security Administration (SSA) denied Petitioner’s application for SSDI. (DDB file)
6. On October 2, 2012, the DDB denied Petitioner’s application for regular Medicaid benefits, finding him to be not disabled for Medicaid purposes. (DDB file)
7. On October 23, 2012, Milwaukee Enrollment Services sent Petitioner a notice indicating that his healthcare benefits would be ending effective December 1, 2012, because he is neither elderly, blind, nor disabled. (Exhibit 4)
8. On November 10, 2012, Petitioner filed for reconsideration of the DDB’s determination. On an unspecified date, Petitioner also filed for reconsideration of the SSA’s determination regarding SSDI benefits. (DDB file)
9. On November 30, 2012, Petitioner filed a request for fair hearing to contest the termination of his health care benefits. (Exhibit 1)
10. On January 25, 2013, the SSA again found Petitioner to be not disabled for SSDI purposes and denied Petitioner’s application. (DDB file)
11. On January 29, 2013, the DDB also upheld its finding that Petitioner is not disabled for Medicaid purposes. On February 4, 2013, the DDB forwarded Petitioner’s file to the Division of Hearings and Appeals for review. (DDB file)
12. Petitioner was admitted to the hospital on January 14, 2013 and remained there until February 2, 2013. During this hospitalization, doctors placed a morphine pump to address Petitioner’s chronic pain issues. This information was not considered by either the DDB or the SSA. (Testimony of Petitioner; Exhibit 10; DDB file)
13. Petitioner was most recently admitted to the hospital on April 25, 2013, where he remained until May 5, 2013, because of complications related to the placement of the morphine pump. Specifically, Petitioner was treated for nausea, vomiting, constipation and severe weight loss and malnutrition. (Testimony of Petitioner; Exhibit 12)

### **DISCUSSION**

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving an application for medical assistance, the applicant has the initial burden to establish he or she met the application requirements.

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. A finding of disability must be in accordance with Federal Social Security/SSI standards. *See Wis. Stats. §49.47(4)(a)4*. Because the standards are the same, a finding of no disability for Social Security/SSI purposes made within 12 months of the Medicaid application is binding on a State Medicaid

agency. Exceptions may occur only if certain conditions exist. Specifically, the Division of Hearings and Appeals has no authority to find a Petitioner disabled unless he or she:

- (i) Allege[s] a disabling condition different from, or in addition to, that considered by SSA in making its determination; or
- (ii) [The MA application is more than 12 months after the most recent SSA determination]; or
- (iii) Alleges less than twelve months after the most recent SSA determination denying disability that his or her condition has changed or deteriorated since that SSA determination, alleges a new period of disability which meets the original durational requirements of the Act, and
  - (A) Has applied to SSA for reconsideration or reopening of its disability decision and SSA refused to consider the new allegations.

*42 CFR 435.541(c)(4)(emphasis added).*

Here, Petitioner applied for Social Security Disability benefits within a month of his application for Medicaid and his application for Social Security Disability benefits was based upon the same disabling conditions listed in his application for Medicaid. The SSA denied Petitioner's request for benefits within 12 months of his application for Medicaid, both on initial application and reconsideration. However, Petitioner contends that his condition has gotten worse since he was denied SSDI on January 25, 2013.

Given that Petitioner has been hospitalized twice between January and April 2013, due to issues related to the condition of his neck and spine, it is found that Petitioner's condition has changed. Indeed, the most recent medical documentation reviewed by the SSA was dated December 24, 2012. Further, Petitioner's application has been denied on reconsideration by the SSA. Consequently, it is found that the SSA decision denying benefits is not binding.

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b).*
2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c).*
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled

will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d)*.

4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f)*.
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g)*.

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

The DDB found Petitioner to suffer from a severe impairment expected to last 12 months or more, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

#### TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

“Substantial activity” is defined as, “work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis.....” *20 CFR 404.1572(a)*

“Gainful work activity” is defined as, “work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b)*. The 2013 substantial gainful activity (SGA) income limit for non-blind individuals was \$1040 per month. (*Please see www.ssa.gov*)

Petitioner is not currently working. As such, he passes test 1.

#### TEST 2

Petitioner passes test 2 because the DDB found that he does have a severe impairment with regard to spine disorders.

#### TEST 3

The question presented here is whether petitioner’s impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; he qualifies as disabled. If Petitioner does not meet the criteria, then he must pass tests 4 and 5 to be considered disabled.

Petitioner concedes that he does not meet the listing criteria. (See Attorney DeLessio’s written argument attached to Exhibit 12) Consequently, the analysis moves on to tests 4 and 5.

#### TEST 4

The fourth test asks whether Petitioner is capable of work he performed in the past. Per *40 CFR 404.1560 (b)(1)*, the question more specifically, is did Petitioner engage in substantial gainful activity (significant

physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

The information in the DDB file is unclear with regard to its determinations concerning whether Petitioner can perform past work. However, based upon Petitioner's credible testimony, it does not appear that he would be able to return to his former employment.

Petitioner previously worked as a machinist between 1996 and 1999; a mover in 1999, as a management reservist in the military between 2007 and 2008 and then again as a mover, last working in 2010. The medical documentation provided by both Petitioner and the DDB show that he has several diagnoses affecting his neck and spine including, "C4-C7 cervical stenosis; neuroforaminal stenosis; L1 vertebrate compression fracture; spondylosis of the cervical spine; cervical lordosis upper cervical spine; osperphypes [sic] present at multiple levels". Consequently, he would not be able to return to work as a machinist or mover.

Petitioner testified that his job as a management reservist between 2007 and 2008 was basically a "desk job", but because it was affiliated with military service, he was required to engage in drills and exercises during the weekend. Again, given Petitioner's issues with his spine and neck, he would not be able to return to military service.

Based upon the foregoing, it is found that Petitioner would not be able to return to his past work. Petitioner passes the fourth test.

#### TEST 5

This test asks whether Petitioner can perform any other work, despite his limitations.

Petitioner is 44 years old and is therefore considered a younger individual. 20 C.F.R. §404.1563(c) Petitioner testified that he has a high school diploma and an associate's degree in human resources management.

The DDB file did not contain any explicit findings with regard to Petitioner's residual functional capacity, but it can be inferred that it found Petitioner to have a residual functional capacity to perform sedentary or light work, based upon Petitioner's age and education, pursuant to the criteria found in *Part 404, Subpart P, Appendix 2, part 201.29 and 202.22*.

However, Part 404, Subpart P, Appendix 2, §200, states:

Where the findings of fact made with respect to a particular individual's vocation factors and residual functional capacity coincide with all the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal...Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.

....

If an individual's specific profile is not listed within this appendix 2, a conclusion of disabled or not disabled is not directed...an individual's ability to engage in substantial gainful activity ...is decided on the basis of the principle and definitions in the

regulations, giving consideration to the rules of specific case situations in this appendix 2. These rules...provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule....

*Emphasis added*

Thus, the ultimate question posed by Test 5, regardless of Petitioner's age, work history and level of ability to communicate in English, is whether Petitioner can engage in any type of substantial gainful activity at all.

The definition of light work is found at 20 C.F.R. § 404.1567 and provides as follows:

(b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

Although the DDB found that Petitioner can perform light work, its conclusion is not supported by the record. A medical assessment signed by Dr. Shekhar A. Dagam dated April 3, 2013, indicates that Petitioner is unable to tolerate sitting for more than ten minutes per day and cannot lift objects weighing ten pounds and is rarely able to lift objects weighing less than ten pounds. (See Exhibit 5)

The definition of sedentary work is found at 20 C.F.R. § 404.1567 and provides as follows:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

Dr. Dagam's medical assessment indicates that Petitioner is only able to sit for ten minutes or stand for five minutes and that he is rarely able to lift less than ten pounds. This is somewhat corroborated by Petitioner's demeanor at the hearing. Although Petitioner was able to sit through the hearing, he was not necessarily able to do so comfortably. Further, Petitioner testified that due to carpal tunnel and paresis in his hand, fingering activities are very difficult for him. Based upon the foregoing, I find that Petitioner is not even capable of engaging in sedentary work, at this time.

I also note the following:

20 CFR §404.1560(c)(1) states, "If we find that your residual functional capacity is not enough to enable you to do any of your past relevant work...we will look at your ability to adjust to other work...Any other work (jobs) that you can adjust to must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country.)"

20 CFR §404.1560(c)(2) further states that, "In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do..."

The DDB provided no documentation or suggestion of what other work exists in significant numbers in the national economy that Petitioner can do given his age, education, work experience and limitations. A vague assertion that there is some job out there that Petitioner can do hardly satisfies the DDB's burden as stated above.

Petitioner passes test 5 and is therefore disabled for Medicaid/MA purposes. However, this case warrants review after two years because Petitioner's condition may improve with increased management of his pain and psychiatric issues.

### **CONCLUSIONS OF LAW**

Petitioner meets the criteria necessary for a finding that he is disabled as that term is defined by Social Security regulation.

**THEREFORE, it is**

### **ORDERED**

That the county agency shall review Petitioner's application for MA and issue any requests for verification it deems necessary within 10 days. The county agency shall, within 10 days of receipt of said verification, certify Petitioner as eligible for MA, if he is otherwise qualified for MA. The agency shall assume an onset date of April 1, 2013.

It is further ordered that the DDB set a reexamination date of April 2015, to determine whether Petitioner is still disabled at that time.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson

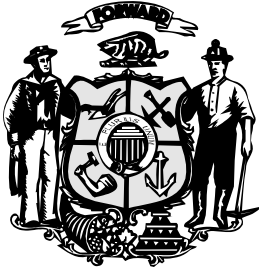
Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 17th day of June, 2013.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on June 17, 2013.

Milwaukee Enrollment Services  
Disability Determination Bureau  
[pdl@legalaction.org](mailto:pdl@legalaction.org)